The Majestic Star Casino, LLC *and* American Maritime Officers, Petitioner. Case 13–RC–20262

August 27, 2001

DECISION AND ORDER REMANDING

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

The National Labor Relations Board, by a three-member panel, has considered determinative challenges in and objections to a mail ballot election held from February 18, 2000, until March 10, 2000, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 3 for and 8 against the Petitioner, with 7 challenged ballots, a sufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs and has decided to adopt the hearing officer's findings[1] and recommendations[2] regarding the Objections.

Contrary to our colleague, we agree with the hearing officer that Petitioner's Objection 3, which alleged that the Employer solicited grievances during a preelection campaign, should be sustained. The relevant facts are these. During the course of the Petitioner's campaign, the Employer held a number of meetings with marine department employees. There is no evidence that the Employer had utilized similar meetings in the past. At these meetings, managers discussed, inter alia, employees' benefits and improving communication between managers and other employees. Some of the meetings were held six times to accommodate the various shifts.

In mid-January, able-bodied seaman Karl Wight (and other employees, including mate Butterfield) attended a meeting held by the Employer's director of human resources, Shannon Swift. Swift asked the group about their problems and concerns, and stated that she did not understand why the employees were seeking to unionize all of a sudden, because the Employer was a pretty good company. In response to Swift's questions, employees mentioned various problems, including the possible change to a 12-hour day (an option which the Employer had been considering since the last quarter of 1999), pay, and scheduling. After the employees mentioned these items, Swift stated that there was a lack of communication between management and employees, and, while taking notes of employees' concerns, told them that she was going to look into these things the best she could. Wight testified that Employer representatives had repeatedly told employees throughout the campaign that it could not make any promises during the campaign. A statement to this effect was also printed in some of the Employer's campaign documents.

The hearing officer found that, although Chief Operating Officer Kelly had repeatedly told employees that he could not make any promises, there was no evidence that, during *her* mid-January meeting with employees, Swift ever advised employees that the Employer was prohibited from promising to remedy their grievances during the campaign.

Board law in this area is clear:

> Absent a previous practice of doing so . . . the solicitation of grievances during an organizational campaign accompanied by a promise, expressed or implied, to remedy such grievances violates the Act . . . [I]t is the promise, expressed or implied, to remedy the grievances that constitutes the essence of the violation . . . [T]he solicitation of grievances in the midst of a union campaign inherently constitutes an implied promise to remedy the grievances. Furthermore, the fact [that] an employer's representative does not make a commitment to specifically take corrective action does not abrogate the anticipation of improved conditions expectable for the employees involved. [T]he inference that an employer is going to remedy the same when it solicits grievances in a preelection setting is are rebuttable one.

Maple Grove Health Care Center, 330 NLRB No. 121, slip op. at 1 (2000). Further, "the Board has found unlawful interference with employee rights by an employer's solicitation of grievances during an organizational campaign although the employer merely stated it would look into or review the problem but did not commit itself to specific

[1] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

[2] In the absence of exceptions, we adopt pro forma the hearing officer's recommendations that Objections 2, 4, 5, 6, and 7 be overruled. In addition, in the body of her report the hearing officer made "no recommendation" on Objection 1 (alleging the unlawful suspension and termination of employees Leonard Cohen and Eddie Chase) and the challenge to the ballot of Leonard Cohen, finding that disposition of these issues must await final disposition from the General Counsel's Office of Appeals in Case 13–CA–38378. We have been administratively advised that the appeal has been denied and Case 13–CA–38378 has been dismissed. Accordingly, we overrule Objection 1 and sustain the challenge to Cohen's ballot. *Texas Meat Packers*, 130 NLRB 279 (1961).

corrective action; the Board reasoned that employees would tend to anticipate improved conditions of employment which might make union representation unnecessary." *Uarco Inc.*, 216 NLRB 1, 1–2 (1974).[3]

Our colleague contends that Swift did not promise to remedy employees' grievances.[4] We disagree. As stated above, Swift told employees that she would look into their concerns (12-hour day, pay, and scheduling), which they expressed to her after she asked them why they were seeking union representation. This statement constitutes a promise to look into employees' specific grievances, which Swift had solicited. The fact that Chief Operating Officer Kelly stated, on other occasions, that *he* could not make any promises (and the fact that such statements may have been contained in memoranda) does not constitute sufficient evidence to rebut the objectionable effect of Swift's solicitation of, and promise to remedy, employees' grievances at the mid-January meeting.

Thus, we agree with the hearing officer that Swift's statements were objectionable.

The hearing officer also recommended, inter alia, overruling the challenges to the ballots of six mates based on her findings that the mates were not supervisors under Section 2(11).[5] Subsequent to the hearing officer's recommendation, on May 29, 2001, the Supreme Court issued its decision in *NLRB v. Kentucky River Community Care*, 121 S.Ct. 1861 (2001). In that case, the Court upheld the Board's rule that the burden of proving Section 2(11) supervisory status rests on the party asserting it. However, the Court rejected the Board's interpretation of "independent judgment" in Section 2(11)'s test for supervisory status, i.e., that registered nurses will not be deemed to have used "independent judgment" when they exercise ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards. Although the Court found the Board's interpretation of "independent judgment" in this respect to be inconsistent with the Act, it recognized that it is within the Board's discretion to determine, within reason, what scope or degree of "independent judgment" meets the statutory threshold. In discussing the tension in the Act between the Section 2(11) definition of supervisors and the Section 2(12) definition of professionals, the Court also left open the question of the interpretation of the Section 2(11) supervisory function of "responsible direction," noting the possibility of "distinguishing employees who direct the manner of others' performance of discrete tasks from employees who direct other employees." *Kentucky River*, 121 S.Ct. at 1871.

The hearing officer recommended overruling the challenges to the ballots of the mates based on her findings that, inter alia, "the mates' direction of the unskilled labor performed by the able-bodied seamen and the deckhands is routine and reveals no independent judgment," and "the assignments made by the mates at the daily meetings were simply being passed down from the captain."

In light of *Kentucky River*, the Board has decided to remand this proceeding to the Regional Director to reopen the record on the issue of whether the Employer's mates "assign" and "responsibly direct" and on the scope and degree of "independent judgment" used in the exercise of such authority.

Additionally, the Board requests the parties and the Regional Director to consider two recent circuit court decisions, *Brusco Tug & Barge Co. v. NLRB*, 247 F.3d 273 (D.C. Cir. 2001), and *Empress Casino Joliet Corp. v. NLRB*, 204 F.3d 719 (7th Cir. 2000), denying enforcement of the Board decisions.

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[3] "The Board has consistently held that an employer's solicitation of employee grievances and its promise to remedy those grievances during an organizational campaign or preelection period is objectionable conduct which interferes with the free choice of employees in an election." *Carbonneau Industries*, 228 NLRB 597, 599 (1977), and cases cited therein.

[4] Our colleague asserts that the statement at issue "closely resembles" the employer's preelection statement in *Noah's New York Bagels*, 324 NLRB 266, 267 (1997), urging employees to, inter alia, "[p]lease vote to give us a second chance to show what we can do." The Board found that that statement, which the General Counsel had alleged was an unlawful promise of benefits, was protected because "the Respondent did not make any specific promise that any particular matter would be improved." Id. In this case, unlike the employer in *Noah's New York Bagels*, Swift, the Employer's human resources director, asked employees about their problems and concerns; employees responded by naming specific items (i.e., pay, scheduling, and the potential change to a 12-hour day). After hearing employees mention these concerns, Swift stated that she would look into "these things." Swift's statement that she would look into "these things" is different from an employer's '"[g]eneralized expression[]'" requesting 'another chance'" or '"more time'" to improve an employer-employee relationship. Id., quoting in part *National Micronetics*, 277 NLRB 993 (1985). Vague statements of that sort may be protected because they "do not promise that anything in particular will happen" and indicate, instead, a "general desire to make things better." *National Micronetics*, supra at 993. Here, Swift's statement that she would "look into" the specific items constituted an implied promise to remedy those items, and was thus not a generalized and innocuous request for "`another chance'" or "`more time'" to improve the Employer's relationship with its employees. *Noah's New York Bagels*, supra, at 267, quoting *National Micronetics*, supra at 993.

[5] The Union argues in its answering brief that the Regional Director should not have included the supervisory status of the mates as an issue for hearing and the hearing officer should not have addressed that issue because the Employer should be held to the terms of the stipulated election agreement, which specifically included mates in the stipulated unit description. We find it unnecessary to address the Union's argument because the Union did not file exceptions to the hearing officer's report, and accordingly has not properly raised the issue before the Board.

ORDER

IT IS ORDERED that this matter is remanded to the Regional Director for Region 13 for further appropriate action and for a reopening of the record on the issues specified above.

Dated, Washington, D.C. August 27, 2001

Wilma B. Liebman, Member

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN HURTGEN, dissenting in part.

Contrary to my colleagues, I would overrule Petitioner's Objection No. 3. The hearing officer found that Employer manager Swift asked employees what issues caused them to seek representation and that Swift, while taking notes of the employee complaints, said that she would look into things the best she could. The hearing officer found that nothing in the record showed that Swift personally told the employees that the Employer could not promise to correct grievances during the campaign. However, the hearing officer noted Swift's testimony that Chief Operating Officer Kelly repeatedly told employees that he could not make promises. The hearing officer likened the instant case to *Raley's, Inc.*, 236 NLRB 971 (1978), in which the Board found that the respondent's oft-repeated phrase of "no promises" was a mere formality. The hearing officer found that Swift solicited grievances and promised to correct them. The finding was based on the fact that Swift took notes and told employees that she would look into things the best she could. The hearing officer found that this conduct interfered with the election.

I disagree. As an initial matter, I note that *Raley's* is distinguishable. In that case, unlike here, the employer had no policies or procedures for addressing employee concerns; there were numerous statements made by multiple managers, specifically promising to address new issues raised by the employees, such as increased wages and supervisory abuse; the employer specifically announced a new open door policy, thereby expressly granting a new procedure; and, the promises were made in the context of other unfair labor practices, including the unlawful granting of the exact benefits and changes promised by the employer in soliciting grievances.

These elements of *Raley's* are not present here. This case more closely resembles *Noah's New York Bagels*, 324 NLRB 266 (1997), in that the Employer did not make any specific promise that any particular matter would be improved. My colleagues find that Swift's statement that she would look into "these things" (the employees' concerns) was an implied promise to remedy grievances. They say that this was unlike the *Noah's* statement which urged employees to give the employer a second chance to show what it could do. In my view, neither the statement in *Noah's* nor the one here constituted such a promise. Indeed, the statement in *Noah's* (that the employer wanted a second chance) was arguably a statement that changes would be forthcoming. By contrast, the statement here was simply a pronouncement that the Employer would consider the employee grievances.

Thus, assuming arguendo that Swift solicited the grievances, I find that she did not promise to remedy them. To the extent that a solicitation gives rise to an inference of a promise, that inference is rebutted by the facts herein. Swift simply stated that she would look into the grievances, as would any prudent employer. The implication was clear: no promises were being made. Further, Kelly made it *expressly* clear that no promises were being made. Accordingly, I would overrule the objection.

Dated, Washington, D.C. August 27, 2001

Peter J. Hurtgen, Chairman

NATIONAL LABOR RELATIONS BOARD